Chuah Eng Khong v Malayan Banking Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-19 OF 1997(W)
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN AND MOHAMED DZAIDDIN FCJJ
23 MAY 1998

Contract *— Interest — Construction — Loan agreement provided for covenant to pay interest higher than statutory rate — Summary judgment obtained — Whether covenant to pay interest was an independent covenant or had merged in the summary judgment — Whether res judicata applied*

Land Law *— Mortgage — Equitable mortgage — Borrower borrowed from lender for payment of purchase price of land — Borrower assigned all rights, title and interest in land by way of security for the loan — Whether this was a charge or a mortgage — Whether loan agreement created any interest in land — Whether principles of equity applied*

The appellant ('the borrower') entered into a loan agreement ('the loan agreement') with the respondent ('the lender') whereby the borrower borrowed RM60,000 for the payment of the purchase price of some land, and agreed to pay interest thereon. In consideration thereof, the borrower assigned unto the lender all his rights, title and interest in the land by way of security for the loan. The borrower defaulted in the payment of interest and instalments and the lender filed an action in the sessions court stating that by virtue of the default, the whole of the sum lent together with interest thereon became wholly due and payable. Summary judgment was granted by the sessions court and neither party appealed against this ('the final judgment'). Based on the summary judgment, the lender caused to be issued a bankruptcy notice. The lender claimed interest at the higher contractual rate as in the loan agreement and not at 8% pa as granted by the final judgment.

The lender contended that it was entitled to keep and hold on to the document of title because a mortgagee was entitled to retain the security or the document of title until the contractual interest stipulated by the mortgage had been paid. The Court of Appeal found that under the loan agreement, the covenant to pay interest was an independent covenant. The borrower appealed on the ground that the loan agreement was not a charge or mortgage, and that the covenant on the contractual rate of interest had merged in the final judgment of the sessions court. As such, the argument was that res judicata applied to the final judgment and the lender had to claim interest at the rate of 8% pa. At the same time, the lender also filed a cross-appeal on several grounds.

Held, allowing the appeal but dismissing the cross-appeal:

(1) At common law and under the relevant rules of equity, the loan agreement would amount to an equitable mortgage because the assignment of the right, title and interest in the land was expressly

or obviously for the purpose of securing the loan given to the borrower to purchase the land. Although nowhere in the loan agreement was the word 'mortgage' used, it is a security transaction in connection with the loan given by the lender with a provision for repayment, after which, the borrower shall be entitled to obtain a discharge and release of the lot from the lender. The borrower at the time of signing the loan agreement had no legal estate but only an equitable interest as a purchaser by contract from a housing developer. This gave the borrower a second right to redeem after the contractual right to redeem the land by a contractual date had lapsed due to expiry of time. Further, there was no deposit of document of title with the lender (see pp 108I, 109A–D, H and 111F).

Thus, if the loan agreement is an equitable mortgage, by virtue of the rules of equity, the next issue is whether such equitable mortgage could exist in the presence of the National Land Code 1965 ('the NLC'). Prior Land Code and the present NLC had not contained or had deliberately left out any provisions similar to s 4 of the Selangor Registration of Titles Regulations 1891 which would render such equitable mortgage null and void. Therefore, the decision of *Hj Abdul Rahman* in refusing to uphold the agreement there on account of the said s 4 should not be used as an authority to negative or invalidate any equitable mortgage or equitable charge created by contracts outside any enactments of the Torrens system's registration of titles such as the NLC. Moreover, the judges in *Arunasalam Chetty* had used the expression 'equitable mortgage' to the transaction of loan of money secured by a deposit of title, a fortiori, the loan agreement should be called an equitable mortgage on the facts. Thus, s 21(1) of the Limitation Act 1953 provides 12 years in the case of mortgage of land. The word 'mortgage' is used. Effect should be given to the intention of Parliament.

This being the case, learned counsel's submission that the loan agreement did not create any interest in land is, therefore, fallacious, and further, the submission that the loan agreement was a mere chose in action dealing with personal property (as opposed to land) would also fly in the face of the said interest in land (see p 112C–F); *Hj Abdul Rahman & Anor v Mohamed Hassan* [1917] AC 209 distinguished; *RRM Arunasalam Chetty s/o Sithambaram Chetty v Teah Ah Poh trading under the style of Mun Seng Hin Kee & Anor* [1937] MLJ 17 followed.

(2) It is purely a matter of construction of a document as to whether it contains a covenant for a contractual rate of interest overriding the maximum rate of interest allowed by law or rules of court on any judgment sum claimed under the said document. In the present loan agreement, the covenanted rate of interest was an independent covenant and the contractual rate, though above the statutory maximum rate, was recoverable (see pp 113C and 115D).

(3) The contractual rate of interest as contained in the loan agreement was higher than the 8% pa allowable on judgment under the law then applicable to the date of the final judgment. Repayment of principal and interest was claimed on the basis of such contractual rate in the sessions court. Since there was no appeal from the decision of the sessions court by the lender, res judicata applied to bar any further claim on account of the same kind of interest (see p 115F–G); *Economic Life Assurance Society v Usborne & Ors* [1902] AC 147, *Sim Lim Finance Ltd v Pelandok Enterprises Pte Ltd & Anor* [1981] 1 MLJ 280 and *American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95 distinguished.

Further, O 42 r 12 of the Rules of the High Court 1980 enables the courts to award, in appropriate cases, interests on sums owed at contractual rate of interest not only up to the date of judgment but also to award the same contractual rate on and after the dates of the judgments until satisfaction (see p 116C).

Per curiam:

The decision in *United Malayan Banking Corp Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87 seems to have been based substantially on s 134(2) of the NLC which was held to have precluded rules of equity of relief against forfeiture against the state authority or land administrator from setting aside any order of forfeiture after service of prescribed notices to the registered proprietor and after the enquiry for the registered proprietor to be heard. In so far as the case is meant to preclude rules of equity in relation to land transactions based on contracts between persons, the dictum represents and remains a voice in the wilderness which need never be heeded (see pp 114I and 115A–C); *United Malayan Banking Corp Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87 distinguished.

[Bahasa Malaysia summary

Perayu ('peminjam') telah mengikat suatu perjanjian pinjaman ('perjanjian pinjaman tersebut') dengan penentang ('pemberi pinjaman') di mana peminjam telah meminjam RM60,000 bagi pembayaran harga belian sesuatu bidang tanah, dan telah bersetuju untuk membayar faedah ke atasnya. Sebagai balasan baginya, peminjam telah menyerahhak kepada pemberi pinjaman kesemua hak, hakmilik dan kepentingan dalam tanah tersebut melalui jaminan bagi pinjaman tersebut. Peminjam telah mengingkar dalam pembayaran faedah dan ansuran-ansuran dan pemberi pinjaman telah memfailkan satu tindakan di mahkamah sesyen yang menyatakan bahawa disebabkan keingkaran tersebut, keseluruhan jumlah yang dipinjam bersama-sama dengan faedah ke atasnya menjadi sesungguhnya kena dibayar dan terhutang. Penghakiman terus telah diberikan oleh mahkamah sesyen dan tidak satu pihak pun merayu terhadap perkara ini ('penghakiman muktamad'). Berdasarkan

penghakiman terus, pemberi pinjaman telah menyebabkan pengeluaran notis kebankrapan. Pemberi pinjaman menuntut faedah pada kadar kontraktual yang lebih tinggi sepertimana yang terdapat dalam perjanjian pinjaman tersebut dan bukannya pada kadar 8% setahun sepertimana yang diberikan oleh penghakiman muktamad. A

Pemberi pinjaman menegaskan bahawa ia berhak untuk menyimpan serta memegang dokumen hakmilik kerana seseorang pemegang gadai-janji berhak untuk menyimpan cagaran atau dokumen hakmilik sehingga faedah kontraktual yang ditetapkan oleh gadai-janji itu telah dibayar. Mahkamah Rayuan mendapati bahawa di bawah perjanjian pinjaman tersebut, waad untuk membayar faedah merupakan waad yang bebas. Peminjam telah merayu atas alasan bahawa perjanjian pinjaman tersebut bukannya satu gadaian atau gadai-janji, dan bahawa waad pada kadar faedah kontraktual telah disatukan dalam penghakiman muktamad mahkamah sesyen. Oleh yang demikian, penghujahan adalah bahawa res judicata terpakai kepada penghakiman muktamad dan pemberi pinjaman terpaksa menuntut faedah pada kadar 8% setahun. Pada masa yang sama, pemberi pinjaman telah juga memfailkan satu rayuan balas atas beberapa alasan. B C D

Diputuskan, membenarkan rayuan tetapi menolak rayuan balas: E

(1) Menurut common law dan di bawah kaedah-kaedah ekuiti yang relevan, perjanjian pinjaman sama seperti satu gadai-janji ekuiti kerana penyerahhakan hak, hakmilik dan kepentingan dalam tanah tersebut adalah secara nyata atau dengan jelasnya bertujuan bagi menjamin pinjaman yang diberikan kepada peminjam untuk membeli tanah tersebut. Walaupun tidak terdapat di mana-mana dalam perjanjian pinjaman tersebut perkataan 'gadai-janji' digunakan, ia merupakan satu transaksi cagaran berhubung dengan pinjaman yang diberikan oleh pemberi pinjaman dengan peruntukan untuk pembayaran balik, selepas yang mana peminjam akan berhak untuk mendapatkan satu pelepasan dan melepaskan lot itu daripada pemberi pinjaman. Peminjam pada waktu menandatangani perjanjian pinjaman tidak mempunyai estet yang sah tetapi hanya kepentingan ekuiti sebagai seorang pembeli melalui kontrak daripada pemaju perumahan. Ini memberikan peminjam tersebut hak kedua untuk menebus selepas hak kontraktual untuk menebus tanah tersebut selewat-lewatnya pada tarikh kontraktual telah luput disebabkan perluputan masa. Selanjutnya, tidak terdapat deposit dokumen hakmilik dengan pemberi pinjaman (lihat ms 108I, 109A–D, H dan 111F). F G H

Dengan itu, jika perjanjian pinjaman tersebut merupakan satu gadai-janji ekuiti, menurut kaedah-kaedah ekuiti, isu yang lain adalah sama ada gadai-janji ekuiti yang sedemikian boleh wujud dalam kehadiran Kanun Tanah Negara 1965 ('KTN'). Kanun Tanah terdahulu dan KTN semasa telah tidak mengandungi atau telah dengan sengaja meninggalkan sebarang peruntukan yang sama dengan s 4 Peraturan-Peraturan I

Pendaftaran Hakmilik 1891 Negeri Selangor yang mana akan menjadikan gadai-janji yang sedemikian batal dan tak sah. Dengan itu, keputusan *Hj Abdul Rahman* yang enggan mempertahankan perjanjian disebabkan s 4 tersebut tidak seharusnya digunakan sebagai satu autoriti untuk menidakkan atau mentaksahkan gadai-janji ekuiti atau gadaian ekuiti yang diwujudkan oleh kontrak-kontrak di luar sebarang enakmen pendaftaran hakmilik sistem Torrens seperti KTN. Lagipun, hakim-hakim dalam *Arunasalam Chetty* telah menggunakan ungkapan 'gadai-janji ekuiti' kepada transaksi pinjaman wang yang dijamin oleh satu deposit hakmilik, a fortiori, perjanjian pinjaman tersebut seharusnya dipanggil satu gadai-janji ekuiti berdasarkan fakta-fakta tersebut. Dengan itu, s 21(1) Akta Had Masa 1953 memperuntukkan 12 tahun dalam kes gadai-janji tanah. Perkataan 'gadai-janji' digunakan. Kesan seharusnya diberikan kepada hasrat Parlimen.

Jika demikian halnya, penghujahan peguam yang bijaksana bahawa perjanjian pinjaman tersebut tidak mewujudkan sebarang kepentingan dalam tanah adalah, dengan itu, mengelirukan, dan seterusnya, penghujahan tersebut bahawa perjanjian pinjaman tersebut hanyalah semata-mata suatu hak dalam tindakan yang berurusan dengan harta alih (bertentangan dengan tanah) akan juga bertentangan dengan kepentingan dalam tanah tersebut (lihat ms 112C–F); *Hj Abdul Rahman & Anor v Mohamed Hassan* [1917] AC 209 dibeza; *RRM Arunasalam Chetty s/o Sithambaram Chetty v Teah Ah Poh trading under the style of Mun Seng Hin Kee & Anor* [1937] MLJ 17 diikut.

(2) Ia adalah semata-mata merupakan pentafsiran sesuatu dokumen mengenai sama ada ia mengandungi satu waad untuk kadar faedah kontraktual yang mengatasi kadar faedah maksima yang dibenarkan oleh undang-undang atau kaedah-kaedah mahkamah ke atas mana-mana jumlah penghakiman yang dituntut di bawah dokumen tersebut. Dalam perjanjian pinjaman ini, kadar faedah yang diwaadkan merupakan suatu waad yang bebas dan kadar kontraktual, walaupun melebihi kadar maksima statutori, adalah boleh dituntut (lihat ms 113C dan 115D).

(3) Kadar faedah kontraktual sepertimana yang terkandung dalam perjanjian pinjaman adalah lebih tinggi daripada 8% setahun yang dibenarkan atas penghakiman di bawah undang-undang yang terpakai ketika itu sehingga tarikh penghakiman muktamad. Pembayaran balik jumlah prinsipal dan faedah telah dituntut berdasarkan kadar kontraktual yang sedemikian dalam mahkamah sesyen. Oleh kerana tidak terdapat sebarang rayuan daripada keputusan mahkamah sesyen oleh pemberi pinjaman, res judicata terpakai untuk menghalang sebarang tuntutan yang selanjutnya memandangkan jenis faedah yang sama (lihat ms 115F–G); *Economic Life Assurance Society v Usborne & Ors* [1902] AC 147, *Sim Lim Finance Ltd v Pelandok Enterprises Pte Ltd & Anor* [1981] 1 MLJ 280 dan *American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95 dibeza.

Selanjutnya, A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 membolehkan mahkamah-mahkamah untuk mengawardkan, dalam kes-kes yang wajar, faedah ke atas jumlah yang terhutang pada kadar faedah kontraktual bukan sahaja sehingga tarikh penghakiman tetapi juga untuk mengawardkan kadar kontraktual yang sama pada dan selepas tarikh-tarikh penghakiman sehingga penyelesaian (lihat ms 116C).

Per curiam:

Keputusan dalam *United Malayan Banking Corp Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87 nampaknya telah diasaskan secara substansial pada s 134(2) KTN yang mana telah diputuskan sebagai menghindari kaedah-kaedah ekuiti relief terhadap perlucuthakan terhadap pihak berkuasa negeri atau pentadbir tanah daripada mengetepikan sebarang perintah perlucuthakan selepas penyampaian notis-notis yang ditetapkan kepada tuan punya berdaftar dan selepas siasatan bagi tuan punya berdaftar yang akan didengar. Sejauh mana kes tersebut bertujuan untuk menghindari kaedah-kaedah ekuiti berhubung transaksi-transaksi tanah berdasarkan kontrak-kontrak antara pihak-pihak, keputusan tersebut mewakili dan kekal sebagai suatu suara yang tidak perlu dihiraukan (lihat ms 114I dan 115A–C); *United Malayan Banking Corp Bhd & Anor v Pemungtut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87 dibeza.]

Notes

For a case on the construction of a term on the rate interest, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1825.

For cases on equitable mortgage, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2116–2127.

Cases referred to

Abigail v Lapin & Anor [1934] AC 491 (refd)

American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd [1973] 1 MLJ 95 (distd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Economic Life Assurance Society v Usborne & Ors [1902] AC 147 (distd)

Frazer v Walker [1967] 1 AC 569 (refd)

Hj Abdul Rahman & Anor v Mohamed Hassan [1917] AC 209 (distd)

KALRM Karuppan Chetty v ARPLSP Muthia Chetty [1938] MLJ 221 (refd)

Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266 (refd)

Malayan Banking Bhd v Zahari bin Ahmad [1988] 2 MLJ 135 (refd)

Motor Emporium v Arumugam, The [1933] MLJ 276 (refd)

Murugappa Chetty v Seenivasagam & Ors [1936] MLJ 217 (refd)
Oh Hiam & Ors v Tham Kong [1980] 2 MLJ 159 (refd)
Pawlett v Attorney General (1667) Hard 465 (refd)
RRM Arunasalam Chetty s/o Sithambaram Chetty v Teah Ah Poh trading under the style of Mun Seng Hin Kee & Anor [1937] MLJ 17 (folld)
Sim Lim Finance Ltd v Pelandok Enterprises Pte Ltd & Anor [1981] 1 MLJ 280 (distd)
UMBC v Goh Tuan Laye & Ors [1976] 1 MLJ 169 (refd)
United Malayan Banking Corp Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi [1984] 2 MLJ 87 (distd)
Usborne v Scarfe (1738) 1 Atk 603 (refd)
William Brandt's Sons & Co v Dunlop Rubber Co Ltd [1905] AC 454 (refd)

Legislation referred to

Civil Law Act 1956
FMS Land Enactments 1911
Kedah Land Code
Law of Property Act 1925 [UK]
Limitation Act 1953 s 21(1)
National Land Code 1965 s 134(2)
Registration of Titles Regulations 1891 ss 4, 41
Registration of Titles Enacment 1911
Rules of the High Court 1980 O 42 r 12
Rules of the High Court (Amendment) Rules 1986
Rules of the Supreme Court 1957 O 40 r 11(2)

Appeal from: Civil Appeal No W–02–615 of 1995 (Court of Appeal, Kuala Lumpur)

Malik Imtiaz Sarwar and *Mathew Thomas Philip* (*Malik Imtiaz Sarwar*) for the appellant.
Simon Hue Fook Chuan (*Ho Loke & Koh*) for the respondent.

Peh Swee Chin FCJ (delivering judgment of the court): This appeal raises difficult and complicated questions of law between a borrower of money for the payment of the purchase price of some land which he had bought by agreement and the lender of the said money to whom the borrower had assigned his rights, title and interest in the said land to the lender. The questions arise out of the matter of rates of interest payable on money lent in such a security transaction.

The appellant/borrower entered into a loan agreement with lender/respondent dated 26 March 1984 and entitled 'Loan agreement cum assignment' whereby the appellant borrowed RM60,000 and agreed to pay interest thereon. In consideration thereof, the appellant, inter alia, 'assigns unto the lender all his rights, title and interest in the said lot ... by way of security for loan hereby granted'.

The payment of the rates of interest is of crucial importance in this appeal and the relevant cl 1(i), (ii) and (iii) provide as follows:

> (i) To repay to the lender on demand the loan together with interest thereon at the rate of twelve per centum (12%) per annum (hereinafter referred to as 'the prescribed rate' which expression shall where the context so permits include any other rate or rates which the lender may from time to time stipulate in the manner hereinafter provided) AND until demand as aforesaid to repay to the lender the loan together with interest thereon at the prescribed rate by one hundred and twenty (120) equal monthly instalments of Ringgit Eight Hundred and Eighty-Five only (RM885) each (hereinafter referred to as 'the monthly instalments' the first of such payments to be made on the first day of the month following next after the date on which the full amount of the loan has been paid or advanced to or on behalf or for the benefit of the borrower (or at such other time as the lender may in its absolute discretion stipulate) and the subsequent instalments to be paid at regular successive intervals of one (1) month until the full amount of the loan and interest thereon together with all other monies owing and payable to the lender shall have been fully paid and satisfied.

The appellant is hereafter called 'the borrower' and the respondent, 'the lender'. The loan agreement cum assignment is hereafter 'the said loan agreement'.

The borrower defaulted in the payment of interest and instalments and the lender filed an action in the sessions court on 16 December 1987 stating in the statement of claim to the effect that by virtue of the default, the whole of the sum lent together with interest thereon become wholly due and payable. The borrower claimed:

(a) the sum of RM80,644.84;

(b) interest thereon at the rate of 10% per annum at yearly rests and penalty interest of 1% per annum above the prescribed rate on the arrears of instalment both calculating from 13 November 1987 until satisfaction;

(c) vacant possession of the said property;

(d) costs of this action; and

(e) such further or other relief as this court deems fit and just.

Summary judgment was granted by the sessions court in terms of the prayers aforesaid in open court, most probably after a contest. Extracted summary judgment in the appeal record does not state that the summary judgment was granted on account of the non-appearance of the borrower and his counsel; neither does it mention the presence of any counsel.

It is important to note that neither party appealed against the summary judgment. Therefore, the judgment in the sessions court was final and conclusive between the same parties.

Then on 15 August 1994, the lender, based on the summary judgment, caused to be issued a bankruptcy notice of the same date claiming a total sum of RM132,177.76 with the break-down figures shown therein as follows:

Judgment sum		RM80,644.84
Interest @ 10% per annum on the sum of RM80,644.84 from 13 November 1987 to 3 October 1988 (x 325 days)		RM7,180.70
Penalty interest @ 11% per annum (ie 1% per annum above prescribed rate) on the arrears of instalments from 13 November 1987 to 3 October 1988		RM2,849.81
Further interest @ 8% per annum on the sum of RM 80,644.84 from 4 October 1988 to 15 August 1994 (x 2141 days)		RM37,843.41
Costs		RM3,659.00
Amount due		RM132,177.76

The summary judgment is hereafter referred to as 'the said final judgment'.

Before a bankruptcy petition was presented to the High Court, the borrower filed on 22 December 1994 an originating summons with its heading as follows:

DALAM MAHKAMAH TINGGI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
(BAHAGIAN SIVIL)

SAMAN PEMULA NO S1–24–1016 tahun 1994

Dalam perkara Perjanjian Pinjaman dan Serah Hak bertarikh 26 Mac 1984

dan

Dalam Perkara Notis Kebankrapan bertarikh 15 Ogos 1994 di bawah No Kebankrapan D2–29–1832–94

dan

Dalam perkara Kanun Tanah Negara

dan

Dalam perkara mengenai Tanah yang terkandung dalam HS (M) 14801, PT 5533, Lot 023815, Mukim Ampang

ANTARA

CHUAH ENG KHONG ... PLAINTIF

DAN

MALAYAN BANKING BERHAD ... DEFENDAN

The originating summons claimed as follows:

(a) bahawa pembayaran jumlah wang sebanyak RM132,177.76 dari plaintif kepada defendan, sepertimana yang dituntut oleh defendan

menerusi Notis Kebankrapan Mahkamah Tinggi Kuala Lumpur No D2–29–1832–94, adalah merupakan penjelasan dan penyelesaian penuh hutang plaintif kepada defendan di bawah perjanjian bertarikh 26 Mac 1984 dan penghakiman bertarikh 3 Oktober 1988 di antara kedua-dua pihak;

(b) bahawa defendan memulangkan kembali dokumen hakmilik sementara bagi tanah yang dikenali sebagai Daftar HS Mukim Ampang, No HS (M) 14801, No PT 5533 Lot 023815 kepada plaintif apabila menerima wang sebanyak RM132,177.76 yang tersebut di atas tanpa apa-apa sekatan atau hak ke atasnya;

(c) kos permohonan ini ditanggung oleh defendan;

(d) lain-lain perintah yang dianggap perlu dan bersesuai manfaat oleh mahkamah yang arif.

In support of the originating summons aforesaid, the borrower stated in an affidavit that he sent through his solicitors a cheque dated 16 November 1994 for total amount as claimed in the bankruptcy notice to the solicitors for the lender with instructions that the said cheque should be only paid to the lender upon the lender forwarding the document of title of the said land to solicitors for the borrower.

When not getting a reply, the borrower's solicitors asked for the return of the said cheque. By a fax letter dated 1 December 1994, the solicitors for the lender replied that the payment by the borrower was unacceptable and claimed that the borrower owed the lender RM241,447.31 as at 2 November 1994 (and not the amount claimed in the bankruptcy notice). The larger sum was as a result of the lender claiming interest on the contractual rate as in the said loan agreement until satisfaction and not at 8% pa as granted by the said final judgment. It appears that the lender could not agree with the condition of payment imposed by the borrower, ie the return of the document of title, and the lender contended that it was entitled to keep and hold on to it because a mortgagee was entitled to retain the security or the document of title until the contractual interest stipulated by the mortgage had been paid. The lender relied on *Economic Life Assurance Society v Usborne & Ors* [1902] AC 147. It was also argued that under the said loan agreement, the covenant to pay interest was an independent covenant because cl 14 of the said loan agreement said 'until ... of the whole of the moneys secured by the said lot together with interest thereon and all other moneys payable to the lender hereunder are paid in full'.

It was finally argued for the borrower that the said loan agreement was not a charge or mortgage, and that the covenant about the contractual rate of interest had merged in the said final judgment of the sessions court.

The originating summons was dismissed with costs by the High Court (see [1995] 4 MLJ 500) and the borrower appealed to the Court of Appeal which allowed the appeal to the extent only that the bankruptcy notice was set aside (see [1997] 3 MLJ 173). Costs was awarded to the borrower in the Court of Appeal and the High Court. The borrower then applied for and obtained leave to appeal to the Federal Court which did not impose any condition limiting the further appeal to be heard only on any particular

or specific issue. This means all the issues canvassed in the courts below could be reheard if either party wished.

Principally, the borrower appeals on the following grounds:

(a) The Court of Appeal was wrong in treating the originating summons of the borrower as proceedings concerned only with the validity of the bankruptcy notice.

(b) The Court of Appeal was wrong in not holding that the said loan agreement had merged in the said final judgment obtained by the lender.

(c) The Court of Appeal was wrong in not ordering the return of the document of title in question to the borrower.

The lender has also cross-appealed on the following grounds:

(a) The Court of Appeal was wrong in granting costs, and this was not supported by the grounds of judgment of the court.

(b) The Court of Appeal was wrong in setting aside the bankruptcy notice, a matter not connected with the originating summons of the borrower.

(c) In view of the ambiguity of the heading and body of the originating summons, the Court of Appeal should have struck out with costs the originating summons.

(d) Having found the hands of the borrower soiled, the Court of Appeal ought to have refused the declaratory reliefs sought by the borrower.

The arguments of learned counsel did not however proceed on all the grounds of appeal summarized above, but only on certain points to be mentioned later. This court will use its discretion to refer, where necessary, to such of the points though not argued to make any necessary orders as justice of the case may require.

It was argued for the borrower before us, this has to be borne in mind at all times, that the covenant in the said loan agreement providing for the rate of interest (higher than the statutory maximum rate of interest allowed on judgment in the sessions court) had merged in the said final judgment. This issue then lies at the heart of the instant case, in support of which following further arguments were advanced.

It was further argued that the said loan agreement was not a charge and that *American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95, which concerned a charge, did not apply to the said loan agreement.

It was also argued to our chagrin that the said loan agreement did not create any interest on land; that it was only 'an assignment of a chose in action', and that being a chose in action, it was about 'personalty' and therefore, rights created by the said loan agreement were personal rights which merged in the said final judgment.

It was further argued that the covenant in the said loan agreement concerning the rate of interest was not an independent covenant. Whether a covenant was an independent covenant (or an ancillary one) would be a matter of construction or interpretation.

It was finally argued that res judicata applied to the said final judgment. A

In reply, learned counsel for the lender argued to the contrary. It was argued, in particular, that the covenant to pay the contracted rate of interest had not merged in the said final judgment because:

(a) it was an independent covenant (which is a matter of construction); B

(b) the said loan agreement could be construed either as a charge or mortgage so that *Economic Life Assurance Society v Usborne & Ors* [1902] AC 147 applied. *Sim Lim Finance Ltd v Pelandok Enterprises Pte Ltd & Anor* [1981] 1 MLJ 280 was also cited in support.

Both the decisions of the High Court in dismissing the originating summons C aforesaid and the decision of the Court of Appeal have one thing in common; both courts were of the view that the covenant providing for contractual rate of interest in the said loan agreement which was an independent covenant and not a personal covenant and (which is higher than the rate of 8% pa as awarded by the sessions court in the said final judgment) did not merge in the said final judgment, following the decision D in *Sim Lim v Pelandok* aforesaid. Therefore in effect, if the reasoning is correct, the covenant of the contractual rate of interest survives the said final judgment and that was why the attempted payment of the total sum claimed in the bankruptcy notice aforesaid by the borrower could not, in the opinion of the lender, entitle the borrower to claim the return of the document of title aforesaid. Such survival of the said final judgment by the E contractual rate of interest has all the appearance (when the lender claimed a huge sum in far in excess of the total sum deemed in the bankruptcy notice) of an arcane extension of the said final judgment by the lender.

We would deal with the submission of learned counsel for the borrower which was to the effect that there was such merger in the said final F judgment because, as argued by counsel, the said loan agreement did not create any interest in land, neither was it a charge but that it was a mere chose in action dealing with personalty (ie personal property as distinct from immovable property), creating personal rights which were merged in the final judgment. This argument appears to be sweeping, muddling and G extraordinary, requiring treatment at some length on the basic features respecting interest in land, etc.

Under the said loan agreement, the borrower bought the land in question by borrowing the purchase price from the lender and assigning all the rights, title and interest of the borrower in the said loan agreement to the lender. The borrower agreed to execute a charge over the said land H once the document of title relating thereto was obtained or issued, the said land then being a part of a large piece of land which was under the process of subdivision into various small lots for which subdivisional documents of titles would be issued later. Transactions of the above nature, which were modelled substantially from agreements which purchasers of houses would I make with building societies in the United Kingdom, have been in practice in this country for many, many years.

At common law and under the relevant rules of equity, the said loan agreement would amount to an equitable mortgage because the assignment

of the right, title and interest in the said land was expressly or obviously for the purpose of securing the loan given to the borrower to purchase the said land. The said loan agreement is not an out-and-out purchase of the said land. This view is reinforced by the promise that when the document of title of the said land was available after the completion of the subdivision aforesaid, the borrower would execute a charge in favour of the lender according to the provisions of the National Land Code 1965 ('the NLC'). It is true that nowhere in the said loan agreement has the word 'mortgage' been used, but it is a security transaction in connection with the loan given by the lender with a provision for repayment, after which, the borrower 'shall be entitled ... to obtain a discharge and release of the said lot from the lender' (see cl 27 of the said loan agreement). Thus, we have the loan, the contractual right to repay or to redeem the said land and the assignment of all 'right, title and interest' in the said land pending the exercise of such contractual right to redeem. The said loan agreement, therefore, at common law, will be a mortgage. It would be an equitable mortgage (and not a legal mortgage) because the borrower at the time of signing the said loan agreement had no legal estate (or registered proprietorship of a grant of land) but only an equitable interest as a purchaser by contract from a housing developer, pending the issuance of a separate document of title aforesaid. In other words, it is a mortgage in equity for which the actual form of words is immaterial, provided the meaning is plain when interpreting a document as a mortgage or equitable mortgage; see *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at p 462.

If it is an equitable mortgage, like a legal mortgage, the borrower has obtained a second right to redeem after the contractual date for redemption has expired, ie he has got the equity of redemption for, in the eyes of equity, the lender is not the owner of the said land notwithstanding the said assignment, but the borrower is, but subject to the mortgage, and the lender is a mere 'incumbrancer'. The equity of redemption arises as soon as any document, on a true construction, is found to be a mortgage. The use of the word 'mortgage' may sound like sacrilege in view of the presence of the NLC which does not use the word, especially to a legal man who specializes in 'common law' but not to one who is familiar with 'chancery practice', for to the latter, despite the assignment, the borrower is still the owner of the said land subject to the mortgage. The matter, of course, should not rest here. Further investigation into the legal position of a mortgage in this country is required.

The equity of redemption gives the borrower a second right to redeem after the contractual right to redeem the said land by a contractual date has lapsed due to expiry of time, practically in defiance of such contractual (ie legal) right to redeem. Such equity of redemption has been always recognized as an interest in land since somewhat ancient times; see *Pawlett v Attorney General* (1667) Hard 465 at p 469 and *Usborne v Scarfe* (1738) 1 Atk 603 at p 605, if old authorities are required.

If the said loan agreement is an equitable mortgage, by virtue of rules of equity, could it exist in the presence of the NLC? Let us discuss further.

Rules of equity in general are applicable by virtue of the Civil Law Act 1956 and those rules of equity relating to equitable interests in land

have no doubt always been recognized and applied in Malaysia unless they are expressly or by necessary implication precluded by the NLC. This view has been asserted and reasserted in a number of cases in the appellate courts in Malaysia; in *RRM Arunasalam Chetty s/o Sithambaram Chetty v Teah Ah Poh trading under the style of Mun Seng Hin Kee & Anor* [1937] MLJ 17, in which money of a creditor was secured by a deposit of document of title by the debtor to his land in Kedah. It was held that the principles of equity were applicable to land in Kedah where such application would not be inconsistent with the provisions of the Kedah Land Code which was based on FMS Land Enactments 1911 and the Registration of Titles Enactment 1911, all in fact based on the Torrens system of registration of titles. The Court of Appeal then unanimously held that the deposit of the documents of title as security for repayment of debts operated as an equitable charge by virtue of which the party who lent there acquired an equitable interest in the land covered by the document of title. The Court of Appeal then relied on the following authorities in support of its decision, viz *KALRM Karuppan Chetty v ARPLSP Muthia Chetty* [1938] MLJ 221; *Abigail v Lapin & Anor* [1934] AC 491 at p 502; *Hogg's Registration of Title to Land throughout the Empire* (1920) pp 278–285; *Murugappa Chetty v Seenivasagam & Ors* [1936] MLJ 217; *The Motor Emporium v Arumugam* [1933] MLJ 276 and others. This is not the place and time to elaborate on these cases cited there. The Court of Appeal granted the requested declaration of the creditor that he was an 'equitable chargee' though the original wording of the prayer did not use the word 'equitable' as an attributive.

Of greater and more direct interest to us in that case, other than the fact that the Court of Appeal had granted the declaration asked for by the creditor that he was entitled to be considered as an equitable chargee, is that Whitley Ag CJ (SS) held on the facts that the creditor was (also) an equitable mortgagee by deposit. *Hogg's Registration to Title* which was relied on by his Lordship also referred to it as a mortgage by deposit of document of title. Gordon Smith J also concluded that by virtue of the transaction (loan secured by deposit of document of title), the plaintiff was an equitable mortgagee or an equitable chargee. Terrell Ag CJ (FMS) discussed the transaction on the assumption by the clearest implication that it was an equitable mortgage by deposit. Such an equitable mortgage by deposit was, in relation to land enactments based on the Torrens system, discussed by his Lordship at length and he decided that the security did not contravene the provisions of the Land Code. At pp 20–21 of the report [*Arunasalam Chetty*], he said:

> The learned judge of the first division appears to consider that the proviso makes equitable principles inapplicable in cases of immoveable property. But there is nothing in the Land Code which so provides. An equitable mortgage by deposit is not a charge contravening the express terms of the Land Code; it is a form of security quite outside the Land Code to which effect may be given as a contract inter partes, and which can only be implemented by means of an order of court. That such interests may exist as contracts inter personas, and quite outside any registration of titles enactment is fully recognized by the Privy Council in the case of *Abigail v*

> *Lapin* [1934] AC 491, the principle of which decision was recently adopted by the FMS Court of Appeal in the case of *AMM Murugappa Chetty v S Seenivasagam & Ors* [1936] FMSLR 33; [1936] MLJ 217 ... . It is the duty of the courts to do justice between parties, and unless expressly prohibited by statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds. Registration of titles was introduced to prevent fraud, but to use it for the purpose of prohibiting, or rendering nugatory, ordinary commercial transactions not expressly covered by the enactment, is to enable the enactment to be sued as an instrument of fraud. Even in the Federated Malay States, therefore, the courts have found themselves constrained again and again to apply equitable principles, not because English equitable principles apply, but because the application of such principles is in accordance with natural justice. I would refer in particular to the case of *Boase v Cluny Rubber Estates Ltd & Ors* 2 FMSLR 130 and the more recent case of *Arumugam v The Motor Emporium* [1933–34] FMSLR 21; [1933] MLJ 276.

Although there is a well-known distinction between a mortgage where a borrower's land is usually transferred or assigned subject to the equity of redemption and a charge where such land is not transferred or assigned at all but it gives the chargee rights over the land, a charge of land has always been regarded as a species of mortgage for most practical purposes; see *Law of Real Property* by Sir Robert Megarry (former Vice Chancellor of Supreme Court of the United Kingdom) and HSR Wade (5th Ed) at p 914.

The Court of Appeal used the words 'equitable mortgage' in relation to the security transaction without restraint and totally without any inhibition in the face of the National Land Code. We support such usage.

Here, the said loan agreement, on a true construction, is an equitable mortgage but not an equitable charge, as there was no deposit of document of title with the lender, as in *Arunasalam Chetty*, for when the said loan agreement was signed there was no actual and single document of title over the said land at the time of the signing of the said loan agreement.

The Federal Court in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 approved *Arunasalam Chetty* and held that an equitable charge had arisen when a sum, claimed by the plaintiffs, was paid as deposit for the purchase of some land in which the plaintiffs and the defendant (recipient of the sum) were engaged in a joint venture.

Suffian LP in *UMBC v Goh Tuan Laye & Ors* [1976] 1 MLJ 169 held that the possession of the land title 'gives them an equitable interest in lands ... '. In the fairly recent case of *Malayan Banking Bhd v Zahari bin Ahmad* [1988] 2 MLJ 135, Mohamed Dzaiddin J applied principles of equity in holding the transaction before him to be an equitable charge.

The well-known case of *Hj Abdul Rahman & Anor v Mohamed Hassan* [1917] AC 209 concerned an agreement dealing with land in Selangor in which a debtor transferred his land in Selangor to his creditor as security for a debt with a condition that if the debtor repaid him within six months thereafter, the land would he re-transferred to the debtor. Selangor's Registration of Titles Regulations 1891 was then in force. By s 41 of the

said Regulations, it was provided that whenever any land was intended to be made security in favour of any other person, the proprietor would have to execute a charge in the form provided. Further, s 4 of the said Regulations expressly provided that land could only be dealt with in accordance with the said Regulations and that every attempt to transfer, transmit, mortgage, charge or otherwise deal with the same except in accordance with the provisions of the said Regulations 'shall be null and void and of no effect ... '. The Privy Council was in my opinion driven by s 4 to hold that the agreement conferred 'no real right in the land' and compare the dictum of Terrell Ag CJ set out above.

Subsequent Land Code and the present NLC have not contained or have deliberately left out any provisions similar to s 4 of the said 1891 Regulations. The decision of *Hj Abdul Rahman* in refusing to uphold the agreement there on account of the said s 4 should not be used as an authority to negative or invalidate any equitable mortgage or equitable charge created by contracts outside any enactments of the Torrens system's registration of titles such as the NLC.

The three judges in *Arunasalam Chetty* had used the expression 'equitable mortgage' to the transaction of loan of money secured by a deposit of title, a fortiori, the said loan agreement should be called an equitable mortgage on the facts. Thus, s 21(1) of the Limitation Act 1953 provides 12 years in the case of mortgage of land. The word of 'mortgage' is used. Effect should be given to the intention of Parliament.

Learned counsel's submission that the said loan agreement did not create any interest in land is, therefore, fallacious in view of what has been discussed above, and further, the submission that the said loan agreement was a mere chose in action dealing with personal property (as opposed to land) would also fly in the face of the said interest in land. A chose in action is always in respect of personalty. It is basically a right to file an action to recover money due on a debt or to recover pecuniary compensation on account of breach of contract or tort.

We next deal with the submission of learned counsel for the borrower that the covenant in the said loan agreement providing for a higher contractual rate of interest (higher than the statutory maximum rate on judgment allowed in the sessions court by law) was not an independent covenant and therefore, merged with the said final judgment. It was submitted that there were no words like paying the interest at a specified rate 'before and after judgment'.

We agree with both learned counsel that it is a matter of construction of the said loan agreement containing the covenant for paying a rate of interest (which, incidentally, would invariably be higher than the statutory maximum rate of interest on judgment), whether such a covenant is an independent one from the repayment of the principal or is ancillary to such repayment.

If it is an independent covenant, what legal effect does the lender expect to arise from it? There appear to be two propositions. First, does the lender expect it to be implemented in the judgment, ie to have such

A interest at such enhanced rate imposed on the judgment sum on the date of giving such judgment even though it is higher than the statutory maximum rate for judgment then in force? Secondly, does the vendor expect such enhanced rate, not imposed on the judgment by the court, to be imposed subsequently on the judgment sum against the borrower after the judgment date as if it were a separate judgment ex curia or unilaterally on the part of the lender declared by him ex cathedra? The vendor seems to be acting in the second proportion. Let us probe further.

It is purely a matter of construction of a document as to whether it contains a covenant for a contractual rate of interest overriding the maximum rate of interest allowed by law or rules of court on any judgment sum claimed under the said document. That appears to be the unanimous view of all the Law Lords in *Economic Life Assurance Society* in construing the mortgage deeds in question there, where they found the contractual covenant to override the maximum rate of interest allowed by law or rules of court on the judgment sum.

The mortgage deeds there provided for 5% interest which was described in the covenant as that the mortgagor should pay the principal with such interest 'after the rate hereinafter covenanted' at 5%. Certain section of an English statute described as '1 & 2 Vict C 100 s 17' allowed interest at 4% on judgment sum. All the lower courts there had awarded 4% on the judgment sum until satisfaction. On the final appeal to the House of Lords, the learned Law Lords varied the rate of 4% to 5%.

The covenant providing for the 5% was drafted in language which could not be more commonplace and was nothing close to such demonstrative words as paying the x rate of interest 'before or after judgment'. The rationale for construing it as an independent covenant and not an ancillary one appears to be in the judgment of Lord Davey. His Lordship said at p 155:

> Now, my Lords, it seems to me to be perfectly immaterial for this purpose whether the rights of the Economic Life Assurance Society depend upon the first deeds or the deed of 1858. If they depend upon the first deeds, they are entitled to whatever those deeds give them. If they depend upon the deed of 1858 it appears to me that they are equally entitled under that proviso for redemption to retain the property until they are paid the full amount of their principal and interest. The reason for that is this — that according to the true construction of the proviso I have read, it is not a security to secure the performance of the covenant, but it entitles the mortgagees to sit upon their deeds, as we used to say, or to hold their security until they have been paid every penny of the 20,000*l*, together with interest measured by what is expressed in the covenant.

If that was so, why had the whole matter been described as 'the independent covenant not merging in the judgment' having regard to the circumstances in *Economic Life Assurance* as set out above? Such a description is, with the greatest respect, less than appropriate. The reason for describing it as such seems to be that learned counsel appearing in that case had dealt on 'merging or not merging in the judgment' in their submission (see the report of the case). Thus their Lordships, in deciding that the rate of 5%

was fair and just on a true construction of the proviso for redemption, had sought to go round the statutory rate of 4% on judgment by adopting the wording of independent covenant not merging in the judgment as used by counsel.

Wee Chong Jin CJ in *Sim Lim Finance Ltd v Pelandok Enterprises Pte Ltd* [1981] 1 MLJ 280 preserved the sanctity of law, which at the time of that case also provided the maximum rate of 8% pa on judgment sum, by dismissing Sim Lim's appeal against the grant by the learned registrar of the said 8% pa. At the same time, however, his Lordship also varied the rate from 8% pa to 18% pa as provided in the mortgage document in question by deciding further that 'the plaintiffs are entitled to retain their security until they were paid the principal sum and interest at 18% (the covenanted rate)'. Justice was done according to law in line with *Economic Life Assurance Society v Usborne & Ors* [1902] AC 147, upon which the learned Chief Justice relied in making the said above order.

It may be noted that the Chief Justice was deciding the point in the same case on appeal and not in a subsequent different case.

In *American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95, the Federal Court, relying on *Economic Life Assurance Society v Usborne & Ors*, varied the rate of interest of 6% pa awarded by the lower court to 11% pa on the judgment till satisfaction on and after the date of judgment. Under O 40 r 11(2) of the Rules of the Supreme Court 1957 applicable to this cited case, it was then provided that 'Every judgment for the payment of money shall bear interest at the rate of six per cent per annum'. Again, the Federal Court was deciding so in the same case on appeal.

A statutory charge under the said NLC is a species of mortgage and I venture to suggest perhaps, applying for an order for sale under such a charge in Malaysia is somewhat like applying for an order for sale in a legal mortgage in England which by virtue of the Law of Property Act 1925 of the United Kingdom, when a mortgagor directly applies for order for sale of land of mortgagee, the usual prior application to court for an order of foreclosure (which bereaves a mortgagee of his equity of redemption) is dispensed with. Perhaps also there is the equity of redemption already incorporated in a statutory charge of land under the said NLC. Does this not again somewhat relegate the NLC to its proper place that it is system of registration of titles based on the Torrens system?

We have in mind the discordant dictum in *United Malayan Banking Corp Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87 at p 91 which reads as follows:

> The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other important matters affecting land there and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this.

With the greatest respect, the decision seems to have been based substantially on s 134(2) of the NLC which was held to have precluded rules of equity of relief against forfeiture against the state authority or land

A administrator from setting aside any order of forfeiture after service of prescribed notices to the registered proprietor and after the enquiry for the registered proprietor to be heard. The above dictum went beyond what was really decided. What was really decided was that detailed provisions for forfeiture contained in s 134(2) aforesaid were inferentially meant to supplant the particular rules of equity in regard to forfeiture by the state authority.

In so far as the said dictum is meant to preclude rules of equity in relation to land transactions based on contracts between persons, the dictum represents and remains a voice in the wilderness which need never be heeded. The ratio or guidelines of the Privy Council in *Abigail v Lapin*, *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159, *Frazer v Walker* [1967] 1 AC 569, and in a host of other cases in Malaysia and Australia should be followed.

Coming back to the said loan agreement and learned counsel's submission that the covenanted rate of interest is not in an independent covenant, we find such submission unacceptable (see *Economic Life Assurance Society v Usborne*, as explained above), and that the contractual rate, though above the statutory maximum rate, is recoverable.

We shall now deal with the last point of the submission by learned counsel for the borrower that res judicata applied to the said final judgment.

Indeed, the said final judgment is a final judgment amenable to the doctrine of res judicata as explained in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189.

This contractual rate of interest as contained in the said loan agreement was higher than the 8% pa allowable on judgment under the law then applicable to the date of the said final judgment. Repayment of principal and interest was claimed on the basis of such contractual rate in the sessions court. Such claim was allowed on this basis up to the date of the said final judgment. Both the parties there are the same parties here in connection with the said loan agreement and the matter there and here is the claim for the said interest. As stated earlier, there was no appeal from the decision of the sessions court by the lender. Res judicata applied to bar any further claim on account of the same kind of interest.

Economic Life Assurance Society v Usborne, *Sim Lim v Pelandok* and *American International Assurance v Union Builders* are all appeal cases on the maximum statutory rate of interest binding upon the lower courts in question. The statutory rate was increased to the covenanted rate or contractual rate on appeal finally. These cases cannot be relied on by the lender to say that res judicata did not apply, for the judgments of the lower courts in question in those appellate cases were not final and conclusive judgments between the parties in question until the appellate courts there had decided.

We would add that the controversial point of contractual rate of interest overriding the statutory maximum rate of interest on judgment sum on or after the date of judgment or the question of independent covenant relating to interest on judgment has virtually ceased to be of importance in Malaysia. Order 42 r 12 of the Rules of the High Court

1980 which previously allowed only the maximum rate of interest of 8% on judgment sum or after the date of judgment was in 1986 amended by the Rules of the High Court (Amendment) Rules 1986 (PU (A) 445/86). The said r 12 now reads as follows:

> Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

The words in brackets shown above were added by the amendment. The legal draftsmen seemed to be aware of the issues discussed above. The amendment enables the courts to award, in appropriate cases, interests on sums owed at contractual rate of interest not only up to the date of judgment (as courts seem to have always done) but also to award the same contractual rate on and after the dates of the judgments until satisfaction. The borrower succeeds on the point of res judicata.

It will be seen from above discussion that the borrower has succeeded on the point of res judicata and I will now make such orders as the justice of the case requires.

As regards the bankruptcy notice, it was based on the said final judgment. The borrower paid the sum stated in the bankruptcy notice, ie RM132,177.76 which the lender refused to accept. The sum was subsequently returned to the borrower. What remains to be done by the borrower to discharge the monetary obligation is to effect payment of the said sum once more, if that has not, in the meantime, already been done.

The said document of title has to be returned. The court is vaguely aware of the other parties' interest, having intervened, but such intervention did not materialize in the High Court and it still remains for this court to confine itself to adjudicate between the only parties before the High Court and before us on all matters in dispute as stated in the said originating summons and its connected affidavits. The lender has no right to hold on to the said document of title after the borrower has fully repaid money due as explained above. The subdivisional document of title in question has been issued and given to the lender from the developer who was paid the price of it.

The appeal, therefore, is allowed and the cross-appeal of the respondent dismissed. It is further ordered that an order in terms of the originating summons herein No S1–24–1016–94 in the High Court be granted, except that the sum of RM132,177.76 be paid within one month from the date hereof by the appellant to the respondent without any interest thereon and thereafter at 8% pa after one month from the date hereof until satisfaction and that the document of title, as described in the said originating summons, be returned to the appellant by the respondent on full payment of the said sum of RM132,177.76 subject as aforesaid. The respondent is to pay costs here and in the courts below.

Appeal allowed and cross-appeal dismissed.

Reported by David Lai